IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

McGOLDRICK LUMBER COMPANY,
Appellant,

vs.

CHARLES J. KINSOLVING, and JANE DOE KINSOLVING, whose real name is unknown, his wife, and MILWAUKEE LUMBER COMPANY, a corporation, LYN LUNDQUIST and ELIX LINDQUIST,
Appellees.

No. 2429

BRIEF OF APPELLANT.

F. M. DUDLEY,
CULLEN, LEE & MATTHEWS,
JOHN P. GRAY,
Attorneys for Appellant.

McKEE PRINTING CO., SPOKANE.

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BRIEF OF APPELLANT
STATEMENT OF FACTS.

This action was brought to have certain of the appellees decreed to be the holders of the title to 160 acres of land in the State of Idaho by, through and under the patent of the United States, in trust for the appellant and for its use and benefit, and to require the conveyance thereof to the appellant. Decree was entered in favor of the appellees and this appeal taken.

The matter involved originally arose out of a contest filed in the United States Land Office at Coeur d'Alene, Idaho, by the appellee, Charles J. Kinsolving, against the entry of one John Shannon on certain land under the timber and stone act. The Register and Receiver held that the entry was for speculative purposes, which decision was in turn affirmed by the Commissioner of the General Land Office and then by the Secretary of the Interior.

The record upon which the case was decided consisted

First, of the proceedings in the Land Department, testimony in the contest and the several decisions of the Land Department;

Second, of evidence introduced at the trial of the cause showing that the respondent Milwaukee Lumber Company was not an innocent purchaser from Kinsolving;

Third, certain testimony which the appellees introduced for the purpose of supporting the findings of the Land Department with reference to the original entry of Shannon, which evidence had not been before the department.

Chronologically the records show:

(1) That Shannon, the contestee, made homestead entry for the land in question July 17, 1905, and that September 25, 1906, he offered proof in support of his

application to commute said entry. This proof was not completed for the reason that Shannon's testimony showed he had made no cultivation of the land.

(2) September 26, 1906, he relinquished his homestead entry and filed an application to purchase the land under the timber and stone act.

(3) January 16, 1907, pursuant to notice duly published, Shannon offered and submitted his proof for said land under his timber and stone entry; his proof was accepted, he paid for the land, and on the same day the Receiver issued to him a receipt and certificate of purchase No. 2500.

In addition to the record facts above recited, the following facts are established by the evidence, and found by the Register and Receiver:

(4) January 16,1907, immediately after making the proof and payment for the land, and receiving his certificate, Shannon executed and delivered to Joseph H. Johnson an instrument in the form of a warranty deed, purporting to convey the land in question to said Johnson. The evidence, to which we will hereafter refer more fully, tends to show that this deed was in fact a mortgage.

(5) February 14, 1907, Johnson gave to one Dan McLaren an option for the purchase of the land.

(7) Mr. Johnson testifies, and his testimony in this respect is undisputed, that these papers were given

by him pursuant to a request by Mr. Shannon to find a buyer for the land. (Testimony pages 42-3).

(8) April 25, 1907, Mr. Lammers, acting for his *cesti que trust,* the appellant, purchased the land under this option for $8,000.00, taking a deed from Johnson, in whom the record title was standing by virtue of the conveyance from Shannon to Johnson of January 16, 1907, and taking also an affidavit from Shannon and From Johnson, reciting that the deed from Shannon to Johnson was in fact a mortgage, and taking also a deed from Shannon, who, according to the recitals, was the equitable owner of the land. These deeds and affidavits were at once recorded.

(9) Three months after the conveyance of the land to Lammers for the McGoldrick Lumber Co., and the recording of the deeds and affidavits recited, the contestant Kinsolving initiated his contest by filing his affidavit of contest against Shannon's entry under the timber and stone act. The charges contained in the affidavit of contest are as follows:

(a) That September 24, 1906, Shannon made a written contract with one William McCarter by which he was to deed and convey to McCarter an undivided one-half interest in and to the land sought to be purchased, when he had submitted his final proof and received the Receiver's receipt therefor.

(b) That after Shannon had submitted his final proof and received the Receiver's receipt for the pur-

chase price, he made and executed a deed conveying the land to Joseph Johnson, who subsequently conveyed the land to Roy C. Lammers and the McGoldrick Lumber Co. That in paying to the Government of the United States the purchase price of the land, the money was furnished to Shannon by other parties in consideration of Shannon giving to the party furnishing such money a part of the consideration which he was to receive from Lammers and the McGoldrick Lumber Co.; and that when the consideration for the conveyance to Lammers and the McGoldrick Lumber Co. was paid, that Shannon did not receive more than one-third thereof, the balance having been paid to the parties who had furnished him the money to make final proof.

(c) That "on account of the matters and things above set forth affiant alleges that the said timber and stone entry No. 2500 was made for speculative purposes, and not for the sole and exclusive benefit of the applicant, John Shannon, and that John Shannon by reason of his agreements and contracts, as aforesaid, did not receive the full consideration and value of said land."

The Register and Receiver upon the testimony, all of which is incorporated in the record here, held the entry for cancellation, which action was affirmed by the Commissioner of the General Land Office and the Secretary of the Interior.

Kinsolving made a lieu selection of the lands, filing Santa Fe script thereon, and by quit claim deed conveyed the same to the Milwaukee Lumber Company for a consideration which was not to be paid until an adjustment had been had of the claims of the McGoldrick Lumber Company.

SPECIFICATIONS OF ERROR.

I.

The court erred in overruling the objection of the appellant to the following questions asked of the witness E. B. Caple, called by the appellees:

> ".Q. Now, did you ever have a conversation with Mr. Shannon about his application for the purchase of that land?"

II.

The court erred in overruling the objection of the appellant to the introduction in evidence of the appellees' Exhibit No. 1, and in permitting the same to be introduced in evidence.

III.

The court erred in overruling the objection of the appellant to the testimony of E. B. Caple concerning a conversation with John Shannon, and to the statements of Shannon made to the said Caple.

IV.

The court erred in holding and deciding that the

agreement between John Shannon and William McCarter, dated September 24, 1906, and offered as an exhibit in the contest in the Land Department and there rejected, was before the Land Department or the Secretary of the Interior, or material to the consideration of the said controversy between John Shannon and C. J. Kinsolving.

V.

The court erred in overruling the objection of the appellant to the following question asked of the witness William McCarter, a witness called by the appellees:

> "Q. Were you familiar with the land for which he made homestead entry or upon which he made homestead entry at the Coeur d'Alene United States Land Office, embracing the south half of the northwest quarter, the northeast quarter of the southwest quarter and the southwest quarter of the northeast quarter of Section 9, Township 44, north, range 3 east?"

VI.

The court erred in overruling the objection of the appellant to the following question asked of the witness William McCarter, a witness called by the appellees:

> "Q. How were you interested in the land?"

VII.

The court erred in admitting the testimony of William McCarter with reference to a homestead entry of Shannon.

VIII.

The court erred in holding and deciding that in the controversy in the Land Department or before the Secretary of the Interior the entryman Shannon was seeking affirmative relief, and that the burden was upon him to show that he was entitled to receive the patent which he sought to have issued.

IX.

The court erred in holding and deciding that the burden was upon the entryman Shannon in the Land Department or before the Secretary of the Interior to show that he was guilty of no fraud, and in failing to hold that the burden was upon the person alleging fraud to prove the same by clear and convincing testimony.

X.

The court erred in holding and deciding that the standard or measure of proof required in the Land Department or before the Secretary of the Interior to overturn a final certificate and cancel the same for fraud is or should be different than the measure or standard of proof required in the courts to establish fraud.

XI.

The court erred in holding and deciding that the Land Department or the Secretary of the Interior could cancel a certificate of entry regularly issued on the ground of fraud upon any less measure of proof than a court of equity could cancel a patent.

XII.

The court erred in holding and deciding that it was not necessary to overthrow the same presumption of honesty and the compliance with the law attending a patent, in order to cancel a certificate of entry.

XIII.

The court erred in failing to hold that the issuance of the final certificate of entry to the entryman Shannon was prima facie evidence and raised the legal presumption that the entryman Shannon had complied with the law; and in failing to hold that the same could not be cancelled except for fraud, the testimony of which should be clear, unequivocal and convincing.

XIV.

The court erred in deciding that the Land Department or the Secretary of the Interior could cancel a certificate of entry regularly issued on the ground of fraud, except upon testimony clear, unequivocal and convincing, and in failing to hold that the Land Department or the Secretary of the Interior had no power to cancel the same upon even a bare preponderance of the evidence which left the issue in doubt.

XV.

The court erred in failing and refusing to hold that the appellant was the owner of the lands described in the complaint, to-wit, the south half of the northwest quarter; the southwest quarter of the northeast

quarter, and the northeast quarter of the southwest quarter of Section 9, Township 44, north of Range 3, E. B. M., and that the appellees hold the same in trust for the appellant.

XVI.

The court erred in failing to hold and decree that the appellees be required to convey to the appellant the said premises and the whole thereof.

XVII.

The court erred in dismissing the appellant's bill.

XVIII.

The court erred in not entering judgment in favor of the appellant and against the appellees, as prayed for.

XIX.

The court erred in not holding that the action of the Land Department and the Secretary of the Interior in cancelling the entry of John Shannon, the grantor of the appellant, was illegal, without authority of law and arbitrary.

XX.

The court erred in holding that the Land Department of the United States and the Secretary of the Interior in cancelling the said entry acted in accordance with law and in failing to hold that the action of the Land Department and the Secretary of the Interior was in violation of law and of the rights of the appellant.

XXI.

The court erred in not holding that the Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, erred in holding that the timber and stone entry No. 2500, made by John Shannon for the land in controversy in the contest filed by the appellee, Charles J. Kinsolving, was made for speculative purposes, and not for the sole and exclusive benefit of said John Shannon; and erred in holding said entry for cancellation and in not holding that the Commissioner of the General Land Office and the Honorable Secretary of the Interior erred in affirming the decision of the said Register and Receiver and in not holding that each and every act of said officers in regard to the same was and is against the laws of the United States.

XXII.

The court erred in not holding that the Honorable Secretary of the Interior, in making and rendering his decision affirming the Register and Receiver of the Coeur d'Alene Land Office in holding the entry of John Shannon for cancellation, wrongfully and unlawfully, against the evidence at said hearing, and without any testimony whatsoever to support said finding found the said entry was made for speculative purposes and not for the sole and exclusive benefit of the applicant John Shannon; and erred in not holding that the said Secretary of the Interior misconstrued and misinterpreted the law in making said decision

and in cancelling the entry of said John Shannon and in not issuing a patent for said land.

XXIII.

The court erred in failing to hold and decide that there was no evidence before the Land Department or the Secretary of the Interior to justify the cancellation of the certificate of entry issued to John Shannon on the land described in the complaint.

XXIV.

The court erred in failing to hold that the Land Department and the Secretary of the Interior erred in cancelling the entry of John Shannon, No. 2500, for the lands described in the complaint, and in failing further to hold that the appellee Milwaukee Lumber Company was not an innocent purchaser, and in failing to hold that said company acquired said lands subject to the right of this appellant.

ARGUMENT AND AUTHORITIES.

The appellant contends that there was no evidence whatever upon which the Land Department could cancel the entry of Shannon, and that, under the rules of law governing the cancellation of entries, both as announced by the Federal Courts and as announced and recognized by the Land Department, the cancellation of the entry was wrongful on the part of the Land Department and that the action of the Land Department was the result of an error of law.

The specifications of error will be grouped for discussion; Numbers 8 to 23, inclusive, will be considered togeteh.r The rulings upon evidence 1 to 7, inclusive, will be considered together, and the 24th will be considered last and separately.

THE ACTION OF THE LAND DEPARTMENT IN CANCELLING THE ENTRY OF SHANNON WAS IN VIOLATION OF LAW, UNSUPPORTED BY ANY TESTIMONY, AND THE SUBSEQUENT PATENTEE SHOULD HAVE BEEN HELD BY THE COURT BELOW TO BE THE TRUSTEE OF THE APPELLANT.

In presenting this appeal, we shall consider the allegations of the contest filed by Kingsolving against the entry of Shannon in the order above stated.

The first charge is that Shannon on the 24th day of September, 1906, had executed a written agreement with McCarter by which he, Shannon, was to deed and convey to McCarter an undivided one-half interest in and to the lands sought to be purchased, when he had submitted his final proof and received the Receiver's receipt therefor. The Register and Receiver correctly hold that the charges made in the contestant's affidavit as to this alleged contract cannot be considered in this case for the reasons:

(a) That the alleged contract, a copy of which was offered in evidence by the contestant as protestant's Exhibit "A," shows upon its face that it has no refer-

ence to the timber and stone entry, but refers entirely to the homestead entry. The language is that the first party will convey an undivided one-half interest in and to the land "as soon as he, the said party of the first part, makes final homestead proof of the said lands and premises,. and receives his receiver's final receipt therefor." Assuming a fact which the evidence contradicts, viz: that this alleged contract was the contract of the contestee, Shannon, it appears therefrom that some time over a year after he had made his original entry, and some two days before he offered his commutation proof, Shannon agreed to convey an undivided one-half interest in the land to be entered as soon as his proof was accepted. Such agreement, of course, would be void, under the statute prohibiting agreements to convey, and if Shannon had made his final proof, and had sworn that he had made no such agreement, he would have been guilty of perjury. He did not, however, make such final proof, but relinquished the entry and made a new entry under a different act of Congress.

Now, unless his previous void contract to convey the land to be entered by him under the homestead law, is a bar to any further entry of public lands of the United States, it would not be a bar to his entry of this or any other land, under the timber and stone act, however fatal it might have been to his homestead entry. That by making such void contract the entryman does not expose himself to any penalty, and does not forfeit his right to enter lands under other public

land laws of the United States, is beyond question. So that the contract, even if it were shown to be Shannon's contract, would afford no grounds for attacking his subsequent timber and stone entry.

(b) The evidence, however, does not show that this contract was Shannon's contract. At the time Shannon executed his deed to Lammers, he denied that he had ever made such a contract and said that if there was one upon the records it was a forgery, and he made an affidavit at that time to this effect. Record p. 47. Contestant's Exhibits "D" and "E," Record pp. 94 and 95, and at the hearing Mr. Shannon testified that when he made this affidavit the facts therein recited were fresh in his mind and that the affidavit was true as he swore to it (Record p. 60); and although Mr. Shannon was present, and called as a witness in the case no attempt was made to show, either by him or by any person, that the alleged contract was in fact Shannon's contract. For this reason the Register and Receiver properly rejected the contract when offered in evidence. And this part of the contestant's case must be held to have totally failed in the Department.

The second allegation contained in the affidavit of contest, for the purpose of showing the alleged fraudulent and speculative purposes of the timber and stone entry, charges that after Shannon had submitted his final proof, and received the Receiver's receipt he made and executed a deed conveying the land to Joseph H. Johnson, who subsequently conveyed the

land to Lammers for the McGoldrick Lumber Co.; that in paying the United States Government the purchase price for the land, the money therefor was furnished Shannon by other parties in consideration of his giving such parties a part of the consideration which he was to receive from Lammers and the McGoldrick Lumber Co. and that when the consideration was paid Shannon did not receive more than one-third thereof, the balance having been paid to the parties who had furnished him the money to make final proof.

(a) These allegations are insufficient to support a finding that Shannon's entry was fraudulent or speculative in its nature. Assuming every statement in the allegation to be true, it would not establish that the entry was speculative or fraudulent.

That Shannon had a right to convey the land immediately upon making final proof and payment therefor, or even before making proof and payment, and at any time after making his original application to enter the land, is settled by the decisions of the United States Supreme Court.

In U. S. vs. Budd, 144 U. S., 154, 163, the court says:

> "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the pur-

> chaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government."

In this quotation the court used the term "purchase" as referring to payment by the entryman at the time of making his proof, and antidating the issuance of patent.

In the later case of *Williamson vs. United States,* 207 U. S. 425, the court held that the requirement that the applicant for timber lands should swear that he did no apply to purchase such lands on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should enure in whole or in part to the benefit of any person except himself, applied only to the declaration which he was required to file at the time of making his application to enter the land, and that under the statute he was not required to make such sworn statement at the time he made his proof and payment for the land. They say:

> "When the context of the statute is thus brought into view we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the state as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom. Indeed, we cannot perceive how, under the statute, if any applicant has in good faith, complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right."

And referring to the departmental requirement that such evidence should be offered at the time of making the final proof they hold that such requirement is void as beyond the power of the department to exact, and add:

> "As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose ad interim of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant." Page 462.

And as the allegations of the affidavit above referred to charge only that Shannon did what he would have a perfect right to do at the time he made final proof,

they are insufficient as a matter of law to justify the cancellation of the entry as speculative or fraudulent.

(b) The evidence in the case moreover clearly fails to show any speculative or fraudulent purpose upon the part of Shannon. The apparent thought of the contestant was that there was an understanding with Lammers and the McGoldrick Lumber Co. to purchase this land, and that Johnson, and perhaps other parties, furnished Shannon money to make his payment to the government, under an agreement that when Lammers and the McGoldrick Lumber Co. paid for the land, the parties advancing the money to Shannon would receive a large portion of the purchase price so paid by Lammers and the Lumber Company. Disregarding for the present the conveyance or mortgage to Johnson, we desire to call attention to the undisputed facts with reference to the purchase by Lammers and the Lumber Company. Mr. Lammers testifies that the first talk or conversation he ever had with any person with reference to purchasing this land, was with Mr. McLaren, under his option. (Record p. 43.) That option is dated February 14, 1907, or nearly a month after Shannon had entered and paid for the land.

That his next negotiation with reference to the purchase of this land was between Johnson and himself, after the McLaren option had expired, and at the time the direct option from Johnson to Lammers was given. (Record p. 44.)

This option is dated April 17, 1907, or nearly four months after the entry, and the purchase by Lammers was made April 26, 1907.

Mr. Lammers also testified that prior to February 14, 1907, the date of the option to McLaren, neither he nor the Lumber Company had any negotiations, or any dealings with Shannon, or with any one, with respect to the purchase of this land, and that prior to the date of the purchase, April 26, 1907, neither he nor the Lumber Company, nor any one for him or the Lumber Company, directly or indirectly, had paid, or agreed to pay, Shannon any money whatsoever for the land. Also, that neither he nor the Lumber Company had had, prior to the time Shannon entered the land in January, 1907, directly or indirectly, any agreement, understanding or arrangement with Shannon, or with anyone acting, or claiming to act, for him, by which they were to purchase the land, or any part thereof; and that they never, prior to the entry, advanced any money, or agreed to advance any money, or security, or anything upon which Shannon could realize money to enable him to enter the land; and that neither he nor the Lumber Company had ever, prior to the date of the option from McLaren, made any arrangement or agreement, directly or indirectly, or had any understanding of any kind, with anyone, by which Shannon was to receive any money, or anyone was to receive any money, from Lammers or the Lumber Company for or on account of this land, or the timber thereon.

Also, that neither he nor the McGoldrick Lumber Co., or any officer or agent of the company, to his knowledge, had any notice or knowledge whatsoever, prior to the date of the purchase of the land from Shannon, or until the initiation of this contest, that there was any claim by anyone that Shannon had not entered the land for his own use and his own benefit. (Record p. 50.)

This testimony is undisputed, and its truthfulness unquestioned. It conclusively disproves the allegation that any party furnished money to Shannon in consideration of his giving the party furnishing such money, a part of the consideration which he was to receive from Lammers or the Lumber Company. There being, at the time he entered the land, no contract, agreement or understanding of any kind with Lammers or the Lumber Company to purchase the land, there could be no arrangement or agreement by Shannon with anyone to pay such person any portion of the consideration to be received from Lammers or the Lumber Company.

(c) Still disregarding for the present the conveyance from Shannon to Johnson, we call attention to the evidence with respect to the distribution of the moneys which were paid by Mr. Lammers to Mr. Shannon.

Mr. Lammers' testimony shows (Record p. ....) that of the $8,000.00 which was the consideration to be

paid by Lammers for the land, he made payments under the directions of Shannon as follows:

To John Shannon personally	$ 350.00
To the Exchange National Bank of Coeur d'Alene for Mr. Shannon's account	1,757.00
To Mr. Joseph Johnson	2,939.00
To Judge Ralph T. Morgan	900.00
To William Dollar	200.00
To R. E. McFarland	100.00
To Dan McLaren	50.00
To The Calhoun Hardware Company	24.00
To Winship & Henderson	80.00
Total	$6,400.00

In addition to these payments Mr. Lammers held back $600.00 which Shannon had instructed him to pay to William McCarter as money that he owed him, and $1,000.00, which, under the terms of the agreement was to be retained by Lammers until the United States patent for the land should be issued.

The amount paid to Judge Morgan, $900.00, was for attorney's services, and its good faith is unquestioned. The payment made to Dollar was to pay up an indebtedness that Shannon owed upon a note. The remaining payments appear to have been payments made upon debts honestly due, and, with the exception of the payment to Joseph Johnson, are not questioned.

The right of Mr. Shannon to apply the moneys received by him from the sale of this land upon indebtedness due or owing by him canont be doubted, nor is there any eelment of suspicion in the fact that he made such payments. And even if, in the settlement of his debts, he had parted with the entire consideration which he received for the land, there would still be nothing in the circumstances to cause doubt or inquiry, much less to sustain a contention that the entry was fraudulent, or made for the purpose of speculation.

(d) There remains to be considered in this transaction the dealings with Joseph Johnson, upon which dealings the Register and Receiver base their decision. Testimony with respect to these transactions is not conflicting. Shannon testifies that he had known Johnson prior to making his entry, in January, 1907, a week or thereabouts, and that he stopped at the hotel kept by Johnson, patronized his bar, and when he desired money obtained it from Johnson in sums of ten, twenty or thirty dollars at a time; and that the indebtedness of $2,939.00, which was paid to Johnson April, 26th, at the time of the purchase of the land by Lammers, was so paid for the purpose of liquidating the indebtedness thus incurred. It will be noted that this amount of indebtedness was the amount existing April 26th, 1907, and not the amount existing in January, when Shannon entered the land; and that Shannon speaks specifically of some sum of money which he

obtained from Johnson about February 1st. (Record p. 56.) What the indebtedness to Johnson was at the date of the entry the testimony does not show. And on cross-examination Shannon testifies that at the time of the sale to Lammers, he owed Johnson something like $2,900.00, but that most of this sum was borrowed by him after February 1st, 1907. (Record p. 61.) Shannon, whose faculties appeared to have been seriously impaired by the excessive use of liquor, further testified at the hearing of the contest that he had no recollection of executing the deed conveying this land to Johnson on January 16, 1907; that he recalled making the affidavit which was given to Mr. Lammers at the time he purchased the land (Contestant's Exhibit "D" for identification) and that at the time he made this affidavit the facts recited therein were fresh in his mind, and that the affidavit was true as he swore to it, but that he had no independent recollection of giving any mortgage or title to Johnson immediately after making his final proof on January 16th. (Record p. 61.)

Johnson testifies that Shannon was already a customer at his hotel and saloon; that Shannon had given him the conveyance dated January 16, 1907, and that it was intended as a mortgage to secure the moneys which Shannon owed him at that time. This indebtedness, he further testifies, was on account of his hotel and saloon bill (Record p. 65), and for monies loaned from time to time (Record p. 72), but the witness was

unable to say how much Shannon's indebtedness was at the date of making the entry.

The foregoing are the suspicious facts upon which the decision of the Register and Receiver is based. Shannon testifies positively and directly that he did not obtain the money with which he entered this land from Johnson; that his brother, who resided at Columbia Falls, Montana, was indebted to him for money loaned six or seven years before, and had paid him $500.00 on account of such indebtedness shortly before he made his final proof (Record p. 59). The witness also testifies positively that he did not receive any money on account of his Receiver's receipt prior to the time he conveyed the land to Lammers. (Record p. 59); that Johnson had no agreement with him whatever, at the time he entered the land, by which he, Shannon, was to convey the land to Johnson, and there was no agreement of that kind with anyone. (Record p. 61.) Johnson also testifies directly and positively that he had given Shannon no money for the purpose of enabling him to enter the land at the time he made the entry, and that he had not, prior to the time such entry was made, any arrangement or agreement or understanding with Shannon, directly or indirectly, by which Shannon was to convey the land to the witness after he made his entry. (Record p. 72.)

This testimony, which corresponds with the information given to Mr. Lammers and Mr. Dudley at the time of the purchase of this land by Lammers (see

testimony of Lammers and Dudley (Record pp. 45, 46, 94), is not contradicted or impeached by anyone, and no effort was made to show by any witness that the statements of Messrs. Shannon and Johnson were untrue. Notwithstanding such failure to show that the entry was fraudulent or speculative, or made with monies furnished by other parties for an interest in the land, the Honorable Register and Receiver say:

> "We do not find any direct evidence showing that an agreement between Shannon and anyone else prior to the filing of his timber application, or even prior to the submitting of his proof, had been entered into to convey all or any portion of the land or to give anyone any interest therein, *but in the light of his subsequent actions or acts we are inclined to the belief that there was such an understanding and that his conveyance of the land immediately after proof was pursuant to such an agreement.* Shannon had no recollection of making any conveyance immediately after his proof and it seems to us probable that at the time of making an agreement to convey, if such agreement was made prior to proof, he may have been in such condition as not to know what he was doing. It is impossible for us to read the evidence in this case without feeling certain that Shannon was the victim of someone stronger and wiser than he. We think the record will sustain the view that the entry was made for speculative purposes and not for the sole and exclusive benefit of the applicant, and for this reason we recommend that the entry be cancelled."

It is obvious that in making this finding and decision they base their ruling not upon the ground that any fraud or bad faith was shown, but purely upon the

ground that the evidence left them suspicious of such facts.

It is settled law that fraud and bad faith are never to be presumed. If relied upon in any case for the purpose of striking down a title, it must be shown by clear and positive evidence.

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."
>
> *Maxwell Land Grant Case,* 121 U. S. 325, 381.
> *Colorado Coal Co., vs. U. S.,* 123 U. S. 307, 316.

See also, for a careful discussion of the evidence necessary to establish fraud:

> *Walker vs. Collins,* (C. C. A.) 59 Fed. Rep. 70.
> *U. S. vs. Detroit Timber & Lumber Co.,* 124 Fed. Rep. 393, 401.

We respectfully submit that such reasoning is not correct; that the conclusions from the premises are wrong; that without the smallest particle of direct evidence, the foundation of proof is wanting, and cannot be supplied by the facts in the testimony; and as a result thereof there has been a failure to follow the plain mandates of the law, and that the decisions of

the land department constitute a misconstruction. With the evidence and decisions of the land department in mind, we desire to recapitulate the authorities and law bearing on the subject of circumstantial evidence, and especially the amount and kind necessary to prove frauds.

CIRCUMSTANTIAL EVIDENCE.

> This is proof of various facts or circumstances which usually attend the main fact in dispute, and therefore tend to prove its existence, or to sustain, by their consistence, the hypotheses claimed. (Black's Law Dic.)

There is not one fact in the testimony that attends the main fact in dispute—fraud at the time of the entry—September 26, 1906, and there are no facts which by their consistency sustain the hypotheses claimed—fraud at the time of the entry.

Only one conclusion must be drawn from the facts.

> A conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature and so related to each other that no other conclusion can fairly or reasonably be drawn from them, and this requirement is strictly enforced where decisive direct evidence is probably obtainable, but is not produced. (Cyc. Vol. 17, p. 817, citing numerous cases.)

We maintain that other conclusions than the ones reached by the land department can readily be reached, just as fair and reasonable ones as the one

arrived at; in fact it is impossible to conceive that if the McGoldrick Lumber Co., or any one acting for it, had planned to obtain this land as early as September 26, 1906, the date of Shannon's filing his application, it would have chosen a man as ignorant as Shannon to carry out its scheme, and would have arranged matters as clumsily as the facts disclosed them to be.

As a matter of fact, and as a positive indication that the land department misconstrued the law, their opinions show that they arrived at their conclusions that there was fraud in the original entry of Shannon —September 26, 1906,—by inferences derived from inferences. As an example, they infer that because it was stated that Johnson loaned money to Shannon, although the testimony is clear and satisfactory that money was loaned at many different times, that the money was used o pay the Government for making final proof on January 16, 1907, and from that inference that there must have been fraud in the entry of September 26, 1906. Also, by way of example, they infer that Shannon must have been under the influence of someone stronger and wiser than he, arising from acts of Shannon on and after January 16, 1907—clearly forgetful of the fact that Shannon had made his homestead entry for this land way back in 1905 before meeting any of these parties—and from that inference they infer that there must have been fraud existing at the time of Shannon's filing his application—September 26, 1906. The law is very explicit that such construction is faulty and erroneous.

> "There must be some fact of facts proved by direct evidence, just as any other facts in the case are proved, upon which the inference is to be based. No inference will be admitted as circumstantial evidence. Citing *Douglas v. Mitchell, Executor,* 35 Pa. St. 440; *Manning v. Ins. Co.* 100 U. S. 693; *U. S. v. Ross* 92 U. S. 281. (Greenleaf on Ev., Sec. 13 N.)."

The case of *United States v. Ross,* 92 U. S. 281, contains an instructive opinion on this point of law. In that case a person attempted to make a claim under the benefit of the so-called "Captured and Abandoned Property Act." A part of the opinion follows:

> "It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. Because the 31 bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards, at some unknown time (whether before or after Aug. 19, does not appear), was shipped on the road to Kingston, it is inferred that the claimant's cotton was part of the shipment. Because somebody's cotton (how much or how little is not known) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 14th of August, 1864, it is inferred that the claimant's 31 bales, presumed to have reached Chattanooga, thus arrived and were forwarded; and because 42 bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them.
>
> "These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from in-

ferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev. p. 80, lays down the rule thus:

"'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' * * *

"The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. * * * There is no open and visible connection between the fact out of which the first presumption arises and the fact soughe to be established by the dependent presumption."

(Citing *Douglas v. Mitchell,* 35 Pa. St. 440.)

The point that the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred, and if it has not, it is regarded as too remote, and that the only presumptions of fact which the law recognizes are immediate inferences from facts proved, is also decided in the case of *Manning v. Insurance Co.,* 100 U. S. 693.

Further considering the evidence necessary the citations following show what is required:

To prove fraud, the evidence must be clear and satisfactory. *Lalone v. U. S.,* 164 U. S. 255; *Beck*

v. Houpert, 104 Ala. 503; *Kahn v. Traders Ins.,* 4 Wyo. 419.

Hammon on Evidence, p. 25.

A man who alleges fraud must clearly and distinctly prove the fraud he alleges, and the proof must be clear and sufficient to satisfy the mind and conscience of the existence of the fraud.

Kahn v. Ins. Co., 4 Wyo. 419.

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

U. S. v. Budd, 144 U. S. 161, quoting from Maxwell Land Grant Case, 121 U. S. 325.

Similar cases to the same effect are *U. S. v. Detroit Timber & Lumber Co.,* 124 Fed. Rep. 393; *Walker v. Collins,* 59 Fed. Rep. 73; *Jones v. Simpson,* 116 U. S. 609; *Hatch v. Bayley,* 12 Cush. 30.

MERE SUSPICION NOT SUFFICIENT.

"In the examination of questions of fraud, courts will look into all the circumstances; and while express and positive proof is not required yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to establish fraud.

Waddingham's Executors v. Loker, 100 Am. Dec. 260, 264.

Brown v. Mitchell, 11 Am. St. Rep. 759.

1 *Story's Eq. Jur.* 186.

Trenchard v. Wanley, 2 P. Will 166.

Townsend v. Lowfield, 1 Ves. 35.

Walker v. Symonds, 3 Swanst. 61.

Bath and Montague's Case, 3 Ch. Cas. 85.

"It is said to be equally a rule in courts of law and equity, that fraud is not to be presumed, but must be established by proof. Not however by mere circumstances of suspicion, leading to uncertain results, but if not by positive and express proof, at least by circumstances affording strong presumptions.

Juzan v. Toulmin, 44 Am. Dec. 462.

MUST OVERCOME PRESUMPTION OF HONESTY.

The proof must be sufficient to satisfy of the existence of fraud. And to do this, it must be sufficient to overcome the natural presumption of honesty and fair dealing. And that is undoubtedly one of considerable force. Hence neither courts or juries should find fraud except upon reasonably satisfactory evidence.

1 *Story's Eq. Jur.* 187.

Walker v. Collins, 59 Fed. Rep. 73.

Vol. XIV., p. 190 *Am. & En. Ency.* and cases cited.

BARE PREPONDERANCE OF EVIDENCE NOT SUFFICIENT.

A jury is bound to exercise its judgment in accordance with correct and common modes of reasoning. It cannot adopt an inference from a few of the proven facts, when that inference is absolutely inconsistent with, and is repelled by, other equally well proven facts.

Colo. Coal & Iron Co. v. U. S., 123 U. S. 307.

From the facts in the case at bar, it is clear that in making their finding, the land department based their

rulings, not upon the ground that any fraud or bad faith was shown, but purely upon the ground that the evidence leaves them suspicious of such fact. As shown above, however, it is well settled that fraud and bad faith are never to be presumed. If relied upon in any case for the purpose of defeating a title, it must be shown by clear and positive evidence. And the authorities are unanimous that testimony which merely raises a suspicion is insufficient.

It may be suggested that a different ruling applies to a hearing of this nature before the department, but such a suggestion is unsound in principle, and not supported by authority. Prior to the issuance of patent the department possesses the authority, by virtue of its supervision over proceedings in the land office, to cancel an entry for fraud.

Hawley vs. Diller, 178 U. S. 476, 488.
Michigan Land & Lumber Co. vs. Rust, 168 U. S. 589, 593.
Orchard vs. Alexander, 157 U. S. 372, 383.

But this power is not an arbitrary one. The rules which control it with respect to the weight and character of the testimony in an action by the United States in a court to cancel or annul a patent for fraud after its issuance, must of necessity control the department in the exercise of its jurisdiction for the cancellation of any entry for fraud before the patent has issued. The issuance of the patent has not affected the ques-

tion except in so far as it has shifted the form and forum in which the question is to be determined. Where the entry is made, and the land paid for, the entryman, if the proceedings be regular, acquires a vested interest, an equitable title, needing only the patent to perfect it, the naked legal title remaining in the United States until the issuance of the patent.

Sark vs. Starr, 5 Wall 402, 418.
Wirth vs. Branson, 98 U. S. 118, 121.
Cornelius vs. Kessel, 128 U. S. 456, 461.
Carroll vs. Safford, 3 How. 441, 460.
Witherspoon vs. Duncan, 4 Wall, 210, 218.

In *Cornelius vs. Kessel,* 128 U. S. 456, 461, the court says:

> "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties did not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so

as to deprive any person of land lawfully entered and paid for. By such entry and payment, the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. *Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.*"

See also *Orchard v. Alexander,* 157 U. S. 372, 383.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 593.

Hawley vs. Diller, 178 U. S. 476, 488-9.

And in the department the rule that fraud must be established, and that a mere suspicion is not sufficient has been repeatedly laid down in cases where an entry has been contested. Secretary Lamar says:

"It has always been held, as a general rule, that fraud is never presumed, unless such circumstances are shown as will legally justify such an inference. That frauds are frequently practiced under the land laws cannot be doubted; and that individuals and corporations who practice these frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection is equally notorious. But, as was said by Justice McLean, in 9 Pet. U. S., 682, 'Such acts cannot alter the established rules of evidence, which have been adopted as well as with reference to the protection of the innocent as the punishment of the guilty."

George T. Burns, 4 L. D. 62, 64-5.
Peter Gaughren, 6 L. D. 224, 225.
Hagan vs. Severns, et al., 15 L. D. 451, 457.

It may be urged that a finding that the entry was speculative is not equivalent to a finding of fraud. As the statute, however, prohibits a speculative entry, and requires the applicant when making his application to swear that it is not for speculative purposes, it is clear that a speculative entry is a fraudulent entry.

Returning now to the conclusion by the Honorable Register and Receiver that "It is impossible for us to read the evidence in this case without feeling certain that Shannon was the victim of someone stronger and wiser than he," and for the purpose of the argument conceding that there is evidence sufficient to justify this conclusion, it by no measn follows that there was a fraudulent or speculative entry by Shannon himself. Bearing in mind that the law is satisfied, if Shannon was acting in good faith when he made his filing for this land September 26, 1906, it may be conceded, for the purposes of the argument, that Johnson's claim of an indebtedness of $2,939.00 due April 26, 1907, was fraudulent, and that when he obtained the conveyance from Shannon January 16, 1907, he obtained that conveyance by fraud. These concessions would in no wise affect the validity of the entry, and it is with that alone that the department can deal. *If Johnson obtained an undue advantage over Shannon by which he secured an unfair and unjust payment of moneys which Shannon secured by the sale of his land, the question presented would be a question for the courts to decide in an action between Shannon and Johnson.*

It would not be a matter which the department would have jurisdiction to consider.

The only question which the department can consider is whether Shannon was a party to a fraudulent attempt to enter this land and secure the title therefor from the United States. Upon this point there is not a word of testimony sufficient to justify the finding made. Every suspicious circumstance in the dealings between Johnson and Shannon is quite as consistent with the theory that Johnson was engaged in defrauding Shannon, as with the theory that Johnson and Shannon were conspiring together to defraud the United States, and this being so, the presumption must be indulged, if it be held that the suspicious circumstances are sufficient to establish fraud, that the fraud was that of Johnson alone, practiced against Shannon, rather than that of Johnson and Shannon together practiced against the United States. This is the necessary result of the doctrine that fraud will never be presumed. It must be presumed in the first instance that neither Johnson nor Shannon would be guilty of fraudulent conduct. If evidence sufficient to show that some fraud was practiced, of which Johnson was necessarily a guilty party, and the evidence is consistent with good faith upon the part of Shannon, the presumption of innocence requires the department to restrict its finding of fraud to Johnson alone, rather than to extend it to both Johnson and Shannon.

THE POWER OF THE COURT WITH RESPECT TO THE RELIEF PRAYED FOR.

The following propositions as to the powers of the Land Department in issuing patents and as to the powers of the courts over the same, are firmly established:

(1) That the Land Department of the government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made;

(2) That an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and paid for the same, and in all respects complied with the requirements of the law;

(3) That the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee, and

(4) That redress can always be had in the courts where the officers of the Land Department have withheld from a pre-emptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision.

American Mortgage Co. v. Hopper, 64 Fed. 553-560.

Bell v. Hearne, 19 Howard, 252.

Litchfield v. Register & Receiver, 9 Wall, 575.
Gaines v. Thompson, 7 Wall, 347.
Secretary v. McGarrahan, 9 Wall, 298.
Johnson v. Towsley, 13 Wall, 72.
Meyers v. Croft, 13 Wall, 291.
Yosemite Valley Case, 15 Wall, 77.
Shepley v. Cowan, 91 U. S. 330.
Moore v. Robbins, 96 U. S. 538.
Marquez v. Frisbie, 101 U. S. 473.
Quinby v. Conlan, 104 U. S. 420.
Smelting Co. v. Kemp, 104 U. S. 636.
Lee v. Johnson, 116 U. S. 48.
Steel v. Refining Co. 106 U. S. 447.
Cornelius v. Kessel, 128 U. S. 456.
U. S. v. Steenerson, 50 Fed. 504.
Germania Iron Co. v. U. S., 58 Fed. 334.

(5) That in the administration and disposition of the public lands, the decisions of the land department upon the questions of fact are deemed conclusive.

Steel v. Refining Co., 106 U. S. 447.
Johnson v. Towsley, 13 Wall 72.
Diller v. Hawley, 81 Fed. 651, 657.

But as outlined in paragraph (4) above, the jurisdiction and power of disposition which the land department has of the lands of the United States, like the power of every other department of the government, is subject to the laws of the land, and the land department's violation or disregard of them is remediable in the courts.

Hoyt v. Weyerhaueser, 161 Fed. 324, 330. And if "they (officers of the land department), err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions."

Shepley v. Cowan, 91 U. S. 330.
Moore v. Robbins, 96 U. S. 530.
Marquez v. Frisbie, 101 U. S. 473.
U. S. v. Maxwell Land Grant Co., 121 U. S. 325.
Hawley v. Diller, 178 U. S. 476.
Sanford v. Sanford, 139 U. S. 642.

There is thus no question that this court has jurisdiction to review and overrule the decision of the land department, because of misconstruction of the law applicable.

NO EVIDENCE OF FRAUD.

Our contention is that there was a *total lack* of evidence to justify the finding that Shannon's filing made in September, 1906, was speculative; that there was *not* a *scintilla* of *evidence* to support the finding that said entry was made otherwise than for his exclusive use and benefit; and that such a question presents a question of law for the determination of the court.

In *Howe vs. Parker,* 190 Fed. 738, at page 746 the court says:

> "Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. *But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge* or a finding of fact in support of it, *is* in his and in every judicial or quasi judicial tribunal, a *question of law...* (Citing authorities.) And an injurious error of the Secretary in finally deciding that question presents good ground for relief in equity."

In *Ward vs. Joslin,* 186 U. S. 142, at page 147, Chief Justice Fuller says:

> "When a case is tried by a court without a jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based."

In *United States F. & G. Co. vs. Board of Commrs.,* 145 Fed. 144, at page 151 Sandborn, Circuit Judge, says:

> "The verdict of a jury concludes all issues of fact and of mixed law and fact save those questions of law which have been reserved for review, demurrer, motion, request or exception. A finding of the court without a jury has the same effect, with the single exception that when the finding is special the question whether the facts found sustain the judgment is open to review.

"The question whether or not at the close of a trial there is a substantial evidence to sustain a finding in favor of a party to the action, is a question of law which arises in the progress of the trial."

To the same effect see

Laing vs. Rigney, 160 U. S. 531 at 540.

So. P. Co. vs. Pool, 160 U. S. 438 at page 440.

Moore vs. Robbins, 96 U. S. 530, 24 L. ed. 848 at 851.

In *Bogan vs. Edinburgh American Land Mortgage Co.,* 63 Fed. 194, the court says:

"No principle is more firmly established in American jurisprudence than that, after the title passed from the United States to a private party, it is the province of the courts to correct the errors of the officers of the land department, which have resulted from fraud, mistake or erroneous views of the law, to declare the legal title to be held in trust for those who have the better right to them, and to compel their conveyance accordingly."

See also

U. S. vs. Winona, etc., 67 Fed. 948 at 959.

Jordan vs. Smith (Okl.) 73 Pac. 308 at 309:

"So far as the courts are concerned, the findings of facts by the land department in a contest proceeding are as conclusive and binding upon the court as the verdict of a jury in their own tribunal, and *the only inquiry the court can make is, was there any evidence* on which to base the findings?"

See also

Paine vs. Foster (Okl.), 53 Pac. 109 at 115.

In *Potter vs. Holt,* 189 U. S. 292 at page 300, the court says:

> "If the facts found by the Secretary had no tendency to sustain the conclusion reached by him, it might be that a question of law would arise, but such is not the case."

See also the opening paragraphs of the opinion in *James vs. Germania Ins. Co.,* 107 Fed. 601.

McGOLDRICK LUMBER COMPANY IS PRACTICALLY A BONA FIDE PURCHASER.

We urge these propositions strongly for the reason that the evidence leaves no question but that Mr. Lammers and the McGoldrick Lumber Co. acted in the utmost good faith. If fraud there was, they were not parties thereto. They purchased the land, paying therefor the sum of $6,400.00 in cash and retaining a balance of $1,600.00 of the purchase price, and Shannon and Johnson are the beneficiaries of the payment. The loss, if the entry be cancelled, falls upon Lammers and the lumber company, and they are entitled to demand that the entry be not stricken down and they involved in such loss, unless the evidence clearly and unequivocally establishes malconduct upon the part of their grantor, Shannon.

> "The Receiver's final receipts were not notice of fraud and perjury in their procurement, they were notice of honesty and legality in the proceedings that induced their issue. They were

> prima facie evidence that those who received them had the right to patents to the lands, and they raised the legal presumption that entrymen and officers alike had complied with the law."
>
> *United States vs. Detroit Timber & Lbr. Co.* (C. C. A.), 131 Fed. 668.

The McGoldrick Lumber Company purchased from Shannon after Shannon had received a final certificate of entry from the government. A final entry having been made and a final receipt having been issued by the officers of the government authorized to issue the same to Shannon, he was the equitable owner of the land. The final receipt was an acknowledgment by the government that it has received full payment for the land; that it holds the legal title in trust for the entryman and that it will in due course issue to him a patent.

United States vs. Detroit Lbr. Co., 200 U. S. 337.

The certificate of entry is bona fide evidence of the right to patent.

Guaranty Savings Bank vs. Bladow, 176 U. S. 451.

In *Simmons vs. Wagner,* 101 U. S. 261, the court said:

> "Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty."

In other words, the issuance of the final certificate was a declaration by the officers charged with that duty that all preliminary acts necessary to vest title in Shannon had been properly, regularly and legally performed. That final certificate shows that, except for the action of the Land Department complained of in the complaint here, patent would have been issued, and in itself shows that Shannon and his grantees were not strangers to the title, and but for the action of the Land Department in the contest instituted by Kinsolving, would have succeeded to the land.

In a case where a man enters upon public lands, takes a homestead, and before he had complied with the homestead laws and acquired a final certificate he was deprived of his land and the Land Department issued a patent to some third person, in violation of the rights of the homestead entryman, undoubtedly the homestead entryman would have to show that he had complied with the homestead laws for the purpose of showing that he was not a stranger to the title, and that if the wrongful and illegal act of the Land Department be set aside it would inure to his benefit because he would be entitled to a patent.

In the present case, the issurance of the final certificate which was canceled shows that same right in the appellant as the grantee of Shannon, and is in itself sufficient to say but for the improper cancellation of the entry the appellant would have acquired title from the Governmnet of the United Statesc. The appellant

simply, in this case, alleges that it purchased the land upon that final certificate and became the equitable owner thereof, and that as a result of an error of law, in violation of the rights of the appellant, the officers of the Land Department have issued a patent to another.

The court below, in its written opinion, used the following language:

> "The view I have taken of the entire record in the land department is about this: Upon strict analysis, and under the rules prevailing in courts of law, the evidence is insufficient to support a finding that Shannon entered into any agreement or arrangement violative of the law, as the same has been construed in the Budd and Williamson cases; at least affirmative relief upon such a theory would be unwarranted. And still the circumstances, remote and meager though they may be, are such that the mind has difficulty in escaping the general impression that there existed some sort of illegitimate relation between Johnson and Shannon touching this entry. That they were of the opinion that there was something to cover up is scarcely open to doubt. In a sense, as long as the controversy was in the land department, Shannon was seeking affirmative relief,—the burden was upon him to show that he was entitled to receive the patent which he sought to have issued. The officers of the land department were within their rights in requiring of him a candid disclosure of his relations with Johnson, and of the source from which he received the money with which he paid the purchase price of the land, in order that they might from such facts intelligently determine whether or not he was entitled to patent. Such a disclosure he declined to make.

> Moreover, in its investigation of the facts, the department is not necessarily bound by the strict rules of evidence prevailing in courts of law, and clearly the standard or measure of proof required in suits in equity to cancel patents is not demanded in a proceeding such as this in the land office. It was not necessary here to overthrow the presumption attending a patent, for the very good reason that no patent had been issued. That class of cases, therefore, of which the Maxwell Land Grant case is a conspicuous example, is not in point."

We believe it was the view of the court so expressed that influenced the decision of the court below, and we further believe that the court below took in the statement above set out an erroneous view of the law. The trial court was of the opinion that so long as the controversy was in the land department, the entryman was seeking affirmative relief and the burden was upon him to show that he was entitled to receive the patent which he sought to have issued. Such a ruling is new and is not supported by the rulings which have been uniformly recognized both in the courts and in the department. The statement is applicable up to the time the entryman receives his final certificate of entry, but when that has been issued the burden is then upon either the government or the contestant seeking to set aside the entry for fraud to prove that fraud by legal evidence and not simply by the creating of a suspicion concerning the regularity of the entry or the good faith thereof, to shift the burden onto the entryman. One of the latest expressions

of the land department upon this question is contained in the case of

Harkrader v. Goldstein, 31 L. D. 87,

in which case the Secretary says:

> "The local land officers had passed upon and approved his proof. They had accepted the money paid for the land and had given a receipt therefor, and upon the proof and payment had issued final certificate of entry. Having complied with all the terms and conditions necessary to obtaining title, and the officers of the government whose duty it was to act in the premises, in the first instance, having accepted his proof and issued final certificate of entry thereon, the townsite entryman, and those for whom he was trustee, had, upon the face of the record, acquired a vested interest in the land, and, under the law, had become prima facie the equitable owners thereof and entitled to a patent, and anyone thereafter attacking the entry thus allowed assumed the burden of establishing such illegality in the procurement or allowance of the entry as would defeat the issuance of patent thereon."

The issuance of the final certificate raised a legal presumption that the entryman had complied with the laws of the United States.

In the *United States vs. Detroit, etc., Company,* 200 U. S. 320, the court says:

> "But while, until the issue of the patent the land is under the control of the land department, which, upon proper investigation, and for sufficient reasons, may set aside the certificate of entry, yet this power of the land department can

> not arbitrarily be exercised without notice to entryman, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has issued to other parties. *Guaranty Sav. Bank v. Bladow, supra.* It is true, as against the government, and while the title remains in the government, he may not be able to enforce his equity, because no action can be maintained against the government except upon contract, express or implied. *United States v. Jones,* 131 U. S. 1, 33 L. Ed. 90, 9 Sup. Ct. Rep. 669. But while he may not sue on his equity, he may protect that equity when sued by the government."

In protecting that equity it must be that the entryman has the right to demand that the final receipt shall not be cancelled upon mere suspicion of fraud, and that as in any other case of fraud there is a burden upon him who alleges it to sustain his charge.

Neither the court below nor the land departmnet gave the benefit of any such rule to the appellant, but held that the burden of sustaining the validity and honesty of the entry was upon the entryman.

> *United States v. Detroit Timber & Lbr. Co.,* 131 Fed. 668.

THE TESTIMONY OF CAPLE AND WILLIAM McCARTER.

The testimony of E. B. Caple and William McCarter received by the court below is the subject of specifications of error Numbers 1 to 7 inclusive. Objection was made to the admisison of the testimony of

Caple and McCarter, the ruling was reserved, and in the decision of the court apparently no ruling was made. First, however, we desire briefly to state what the testimony was.

Mr. Caple testified that he had been a special agent of the General Land Office; knew Shannon and had taken a statement from him, which was introduced in evidence.

On cross-examination, Caple testified he had always kept the statement in his possession and had not turned it in to the United States; that he took it prior to the hearing of he Kinsolving-Shannon contest; that he was present at the hearing and then he testified:

> "When did you first advise the defendants here that you had this document?
> A. Why, I don't remember. Mr. Kinsolving, I think, spoke something to me about it after or before, I don't know which, after or before his contest, asked me if I had any—
> Q. You couldn't say whether it was before or after?
> A. No, I don't remember." (Record p. 248.)

In other words, Caple testifies that he had taken the statement prior to the contest and as to whether or not he told Kinsolving about it before the contest he does not say, but he does say that he was present at the time of the contest.

Kinsolving did not take the witness stand to show that it was subsequent to the contest, instead of prior thereto.

McCarter testified that he was acquainted with Shannon; that he was interested in a homestead entry of Shannon's; that he paid for the location of it; that he had an understanding with Shannon in writing, which is in the record, for the interest, the agreement being the recorded agreement between Shannon and McCarter, which was before the land department. On page 251 of the Record McCarter testifies that it was before Shannon proved up or was to prove up on his homestead, that he procured the agreement. And on the same page he testifies that he had a conversation with Shannon about acquiring an interest in the land after Shannon had acquired title under the timber and stone act; that that conversation took place at St. Maries and also at Coeur d'Alene. On page 251 McCarter testified that Shannon came to St. Maries to see him about it and that at that time he had an agreement that he was to have an undivided one-half interest or $2,000, and that he also had a conversation with Joseph H. Johnson about the agreement with Shannon, although that conversation is not repeated in the testimony. He also testifies that he had a conversation with Roy C. Lammers the night before or the night Shannon proved up on his timber and stone claim, which conversation is shown on page 252 of the record.

On cross-examination, McCarter testified that the contract under which he was claiming was the one which had been recorded in the Recorder's office of

Shoshone County. On page 252 he testified as follows:

"Q. Did you have any agreement other than this one?
A. No, it all amounted to the same thing."

He testified that they had reduced their prior agreement to writing and then recorded the writing, and he further testified:

"Q. Did you have any subsequent agreements with him?
A. Yes sir.
Q. Now then, when was it with reference to the date that you recorded that instrument up there that you had the subsequent agreements?
A. About fifteen days later, we came to St. Maries.
Q. About fifteen days later?
A. I wouldn't say exactly the time, but it was a little later.
Q. Well, a couple of weeks anyway?
A. Yes sir.
Q. And that was the first arrangement you had had subsequent to your written arrangement?
A. Yes sir.
Q. And that was up at St. Maries?
A. Yes.
Q. And were you over here at Coeur d'Alene when he tried to make his homestead entry that you have been telling about?
A. Yes sir.
Q. And you went back home to St. Maries?
A. I believe so.
Q. And how long after that was it that you had this conversation with him?
A. I couldn't say exactly to the time, but I should judge it was in the neighborhood of fifteen

days or such a matter; it might have been more or it might have been less, but it was somewheres about that time.

Q. And it was up at St. Maries?

A. Yes sir.

Q. Now, with reference to the time you and he were over here, that was the time he was going to make his homestead proof?

A. He was here and I come down.

Q. He didn't make it?

A. No sir.

Q. And it was about fifteen days subsequent to that?

A. Somewhere about there; it might have been more and it might have been less; I cannot say for sure."

The record in the Land Department shows that Shannon offered proof under his homestead entry on September 25th; that on September 26th he relinquished the homestead entry and filed an application to purchase the land under the timber and stone act, and it was under that timber and stone application that his final certificate was issued, upon which final certificate the plaintiff purchased the property. So that under the testimony of McCarter the agreement with Shannon for any interest in the timber and stone claim was some two weeks after he had made his application therefor, and when, if he ever did make any such agreement with McCarter, he had a right to do so under the construction of the timber and stone act by the Supreme Court in the Williamson case.

Roy C. Lammers was called as a witness on rebuttal and testified that he did not know where Shannon

was; that he had been unable to find him; that he had heard the testimony of McCarter; that McCarter did not at any time state that he had an interest in the stone and timber entry of Shannon; that he called Lammers' attention to the written agreement which had been recorded in Shoshone County, and said he had advanced Shannon some money, or that Shannon owed him money, and that he had a claim of record showing an interest in that claim; that was after the time of proof or about the time he made proof; that Mr. Dudley was his, Lammers', attorney; that he had submitted to Mr. Dudley an abstract for the land, and that he told McCarter that Mr. Dudley considered his title of no consequence. That that was the only contract or agreement referred to in any conversation with McCarter; that he never had any conversation with McCarter concerning any such agreement at or about the time that Shannon cancelled his homestead entry, and that he had no other conversation than the one referred to; that he never had had anything whatever to do with any homestead entry of Shannon's. That he had not at any time prior to the time he purchased the claim from Shannon for the McGoldrick Lumber Company, either individually or for the company, have any interest whatsoever therein, nor did the company, and had not furnished him money therefor. (Record p. 258.)

Such briefly states the testimony, but the appellant maintains now, as it did at the hearing, that all such

testimony is improper, irrelevant, immaterial and incompetent for the reasons set forth in the objection found at pages 243 to 247 of the record.

The contest between Kinsolving and Shannon was tried in the land department, and it is upon the record that was there made and the action of the department upon that record that the appellant complains. The foundation of the appellant's complaint is that the land department erred in a matter of law, and for that reason this suit can be maintained. It cannot be that where such complaint is made this court is going to go into the question of and hear over again the testimony that was or might have been introduced in the contest in the land department. If the appellees can introduce additional evidence, then the appellant would have the right to introduce, not only the evidence introduced at the hearing, but other evidence. The court, in passing upon the question of whether or not the land department had committed an error of law, would have other facts and other evidence before it than that introduced at the hearing, and thus in an indirect way the facts would be tried over again.

Upon the theory of the appellees, the right to that land is to be tried all over again in court, in this proceeding. The correct rule is that the appellant must show:

First, that the patent was wrongfully issued by the land department, and

Second, that the appellant is not a stranger to the title, but would be entitled to the land, except for the action of the land department.

In the case of a homestead entryman, who has not his final certificate, he must show a compliance with the homestead law, but in this case or any other case where the final certificate has been issued, that final certificate is prima facie evidence of compliance with the law and is presumptive evidence in this case of the right of the appellant to the land in the event the land department did act in violation of the rights of the appellant as claimed.

For these reasons, we submit that the testimony should not be considered, but we further say that the testimony means nothing in this proceeding; that it amounts to nothing, even if it were considered; that so far as the record is concerned, the testimony of Caple was known to Kinsolving at the time of the other contest—at least it is not shown that he did not know thereof; and as to McCarter's alleged conversation with Shannon concerning any interest in the timber and stone claim, that was two weeks subsequent to the time when Shannon made his original application therefor, and under the Williamson case, it would not have been fraudulent on the part of Shannon to have made such agreement.

THE MILWAUKEE LUMBER COMPANY WAS NOT AN INNOCENT PURCHASER FROM KINSOLVING.

Upon this question the court below did not pass, considering that the matter was disposed of by the view taken upon the first question. This is covered by Specification of Error No. 24.

The Milwaukee Lumber Company was not an innocent purchaser and took subject to the rights of the appellant. The land was filed upon by Kinsolving with Santa Fe Pacific Railroad scrip, and Kinsolving thereafter by a mere quit-claim deed demised, released and quit-claimed the property to the Milwaukee Lumber Company. The Milwaukee Lumber Company did not pay Kinsolving for the land, but still holds the consideration under the contract, appellant's Exhibit "A," as shown by the testimony of the witness Herrick. (Record p. 256.)

In addition thereto, the Milwaukee Lumber Company had full knowledge and notice of the rights of the McGoldrick Lumber Company. Mr. Cullen testified that in May or June he had a conversation with Mr. Braderick, secretary and manager of the Milwaukee Lumber Company, and Mr. Braderick stated that he knew of the claim of the McGoldrick Lumber Company to the property; that he had examined into it before the purchase was made and caused an examination to be made of the records. (Record p. 240.) This testimony was not disputed.

Under the circumstances of this case, with the actual knowledge that Braderick had and particularly with the surrounding circumstances, such as the withholding of the consideration for the property, the Milwaukee Lumber Company was not and could not have been an innocent purchaser under the quit-claim deed.

In *Oliver v. Platt,* 3rd Howard, 383, the court said:

> "A purchaser by a deed of quit-claim, without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration without notice, and he takes only what the vendor could lawfully convey. * * * *
>
> In legal effect, therefore, they (quit-claim deeds) did convey no more than Oliver's right, title and interest, in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a bona fide purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts."

To the same effect are

Dickerson v. Colgrove, 100 U. S. 578.
Baker v. Humphreys, 101 U. S. 494.
May v. LeClaire, 78 U. S. 217.

There are two later cases in the Supreme Court which seem to modify the earlier opinions, but neither of such militate against the position taken by the plaintiff.

In *Moelle v. Sherwood,* 148 U. S. 21 the court held:

> "If a grantee by quit-claim deed takes it without notice of an outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a bona fide purchaser upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest conveyed."

In the case at bar it has been shown that the grantee under the quit-claim deed never did pay the consideration, and has not shown that it was a fair price. Further in the course of the opinion in that case the court said:

> "The character of bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property or a clear title must depend upon the character of the title of the grantor when he made the conveyance; and the opportunities afforded the grantee of acertaining this fact and the diligence with which he has prosecuted them, will, besides the payment of a reasonable consideration, determine the bona fide nature of the transaction on his part."

The same conclusion was reached in the case of

> *United States v. Cailfornia & Oregon Land Co.,* 148 U. S. 31

following *Moelle v. Sherwood,* but in that particular case it was not necessary to the decision, the court holding that the rule could not, even if it existed, be extended beyond the grantee in the quit-claim deed, and would not be extended to cases in which the quit-claim was only a prior conveyance in the chain of title. However, under the decision in

Moelle v. Sherwood

the Milwaukee Lumber Company was not an innocent purchaser of this property. According to the testimony of Herrick, he did not get an abstract of title to the land prior to purchasing it (Record p. 256), and on page 255 of the record he testifies as follows:

> "Q. What, if any, attempt did you make to discover the condition of the title to this property, record condition?
>
> A. Why, I had—I saw the patent to the Santa Fe Railroad, and the powers of attorney of Kingsolving to sell the land, and a telegram from the land office showing that the title of the land was in the Santa Fe Railroad.
>
> Q. You say a telegram from the landoffice?
>
> A. Yes sir, from the Recorder's office.
>
> Q. Do you know what county recorder that was from?
>
> A. From Wallace, Shoshone County."

And Herrick again testified that he bought the land, dictated the contract, or form of contract, that should be given and gave the data to Braderick, and went away; that he bought it on the strength of that patent

and the power of attorney and that telegram (Record p. 256) and did nothing else.

Moreover, under the testimony of Mr. Cullen, Braderick had full and complete notice of the claim of the McGoldrick Lumber Company and disregarded it in the purchase.

CONCLUSION.

We earnestly submit:

First: That a grave injustice has been done to the appellant; that the land department cancelled the entry of Shannon absolutely without a scintilla of evidence to support or justify the same, and without right or authority and in violation of the rights of the appellant;

Second: That the Milwaukee Lumber Company is not an innocent purchaser;

Third: That the appellant was entitled to the decree prayed for in the complaint;

Fourth: That the court below erred in holding in effect that in the controversy in the land department and before the Secretary of the Interior the entryman Shannon was seeking affirmative relief, and that the burden was upon him to show that he was entitled to receive the patent which he sought to have issued, and that in applying any such rule the court below did not give due regard to the presumption arising from

the issuance of a final certificate of entry and proper and due weight thereto.

Respectfully submitted,

F. M. DUDLEY,
CULLEN, LEE & MATTHEWS,
JOHN P. GRAY,
Attorneys for Appellant.